

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
	)	
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230

**The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance,  
Inc. ("IMWED")**

**Amendment to Petition for Extraordinary Relief**

Three EBS Licensees Have Made Inconsistent Representations to the  
Commission Concerning the Length of Their Recent Excess Capacity Leases

In recent weeks, three EBS licensees have written the Commission,  
acknowledging that since January, 2005 they have entered into excess

capacity lease agreements that are longer than 15 years in length.<sup>1</sup> This correspondence was submitted in connection with WT Docket 03-66, and each of these licensees urged the Commission to allow EBS lease terms in excess of 15 years. However, all of these three licensees previously had filed long-term *de facto* transfer applications with the Commission in connection with those leases, which applications all reported that the subject leases are shorter than 15 years.<sup>2</sup>

Clearly, these EBS licensee representations are inconsistent.

#### The Current Controversy Over the Maximum Length of EBS Leases

Beginning in December, 2005, renewed controversy erupted over the issue of the maximum permitted term of EBS leases. A number of EBS licensees---including those cited in this Amendment---wrote to the Commission advocating that leases be permitted in excess of 15 years. In-person *ex parte* presentations were made by advocates for longer leases before Commission staff, as well as Commissioner Adelstein and Chairman Martin. These advocates included a former FCC commissioner and a former assistant secretary of commerce. Representing the other point of view, the National ITFS Association and the Catholic Television Network made *ex*

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<sup>1</sup> These letters were written by School District of Clay County [Florida], Concordia University, and Heritage Baptist Church & Christian Academy.

<sup>2</sup> The long-term *de facto* transfer applications are representations not only of the EBS licensees, but also of the proposed transferees: Gryphon Wireless, LLC (in the case of Concordia University) and Fixed Wireless Holdings, LLC (in the case of the other two applications).

*parte* presentations to staff in support of the current 15-year limit, as did IMWED.<sup>3</sup>

Given that the length of EBS leases has emerged as a key issue before the Commission, an accurate and complete record has become even more critical.

### Inconsistent Representations of School District of Clay County

By a letter dated January 4, 2006, Alisa Jones, School District of Clay County Supervisor of Instructional Support Services, wrote to the Commission in connection with WT Docket No. 03-66. This letter states, in pertinent part: “I am writing on behalf of the School District of Clay County, licensee of Clay High School and Orange Park High School EBS Licensees in Florida... Since the Commission moved earlier this year [sic] from its former EBS leasing rules to those adopted in the *Secondary Markets* proceeding (thereby eliminating the former fifteen year maximum EBS excess capacity lease term), we have negotiated and entered into a new *de facto* transfer lease that extends beyond fifteen years.” [Emphasis added.] The letter submitted by the School District is virtually identical to correspondence filed by the Clarendon Foundation on December 5, 2005 in WT Docket No. 03-66.<sup>4</sup>

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<sup>3</sup> See the record in WT Docket 03-66.

<sup>4</sup> The Commission changed its EBS leasing rules in January, 2005. Thus Clarendon was correct when its December letter stated that the change was made “earlier this year.” The School District copied this phrase literally, as it did with the rest of Clarendon’s letter; because the School District’s letter is dated in the new year, its statement on the timing of the FCC’s decision became incorrect.

In contrast, by a long-term *de facto* transfer application submitted by School District of Clay County (transferor) and Fixed Wireless Holdings, LLC (transferee),<sup>5</sup> the applicants made the following representation: “The term of the lease for EBS Station WNC639 will commence upon the date on which the FCC’s grant of the lease application becomes a Final Order (“Lease Commencement Date”). The lease will not extend beyond: (i) the date such authorization expires by its terms; (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term of [sic?] the termination of the Agreement pursuant to the early termination provisions of the Agreement (“Lease Termination Date”). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable for a term to expire on May 23, 2005, in accordance with the applicable FCC rules.”<sup>6</sup> This application was executed by a representative of the School District on March 1, 2005 and by Fixed Wireless Holdings on March 15, 2005.

This application was amended on June 13, 2005. This amendment stated, in its entirety: “Fixed Wireless Holdings, LLC and Clay High, c/o School Board of Clay County, Florida hereby notify the Commission that because the license for EBS Station WNC639 was recently renewed, the lease is renewable for a term to expire on May 23, 2015, in accordance with applicable FCC rules and the terms of the agreement.” [Emphasis added.]

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<sup>5</sup> This transfer application was assigned FCC File Number 0002089956.

<sup>6</sup> Exhibit 2, entitled “Response to Schedule B, Questions 3(a) and 3(b).” These questions ask the applicants to provide the date the Lease is due to commence and due to expire.

A reasonable reading of the transfer application, as amended, is that the lease term would last less than 10 years---not in excess of 15 years as stated by the School District's January 4, 2006 letter to the Commission.

The documents referred to above are attached to this Amendment.

#### Inconsistent Representations of Concordia University

By a letter dated December 22, 2005, David L. Kumm, Concordia University's VP for Finance, Operations & Planning/Chief Financial officer, wrote to the Commission in connection with WT Docket No. 03-66. This letter states, in pertinent part: "Concordia University is the licensee of EBS station WNC616 in Lincoln, Nebraska... Since the Commission moved earlier this year from its former EBS leasing rules to those adopted in the *Secondary Markets* proceeding (thereby eliminating the former fifteen year maximum EBS excess capacity lease term), we have negotiated and entered into a new *de facto* transfer lease that extends beyond fifteen years."

[Emphasis added.]

In contrast, the long-term de facto transfer application submitted by Concordia University (transferor) and Gryphon Wireless, LLC (transferee)<sup>7</sup> for WNC616 states the following: "Gryphon Wireless, LLC hereby notifies the Commission that the commencement date for the lease Agreement will be December 14, 2005. If however the Commission has not granted this long term de facto lease application by such date, the commencement date will be the date the FCC approves this application. The lease with respect to the

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<sup>7</sup> This application was assigned FCC file number 0002390172.

license will not extend beyond: (i) the date such authorization expires by its terms; (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the early termination provisions of the Agreement (“Lease Termination Date”). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable with respect to the license through October 4, 2020, subject to applicable FCC rules and necessary approvals.”<sup>8</sup> [Emphasis added.] The same exhibit contains a table at the bottom which lists the lease termination date as 05/25/2015. This application was executed by the parties on November 23, 2005.

A reasonable reading of the transfer application is that this lease, if renewed, would last less than 15 years. There is no suggestion that the actual lease term would exceed 15 years, as indicated by Concordia’s December 22, 2005 letter to the Commission.

The documents referred to above are attached to this Amendment.

#### Inconsistent Representations of Heritage Christian Academy

By a letter dated December 23, 2005, the administrator of Heritage Baptist Church & Christian Academy (Orange Park, FL) wrote to the Commission in connection with WT Docket 03-66. This letter states, in pertinent part: “Since the Commission moved earlier this year from its

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<sup>8</sup> Exhibit 2, entitled “Response to Schedule B, Questions 3(a) and 3(b).” These questions ask the applicants to provide the date the Lease is due to commence and due to expire.

former EBS leasing rules to those adopted in the *Secondary Markets* proceeding (thereby eliminating the former fifteen year maximum EBS excess capacity lease term), we have negotiated and entered into a new *de facto* transfer lease that extends beyond fifteen years.” [Emphasis added.] Like the above-described letter submitted by the School District of Clay County, the Heritage letter is essentially identical to that filed by the Clarendon Foundation---so similar in fact that Heritage did not bother to change the first sentence, which incongruously states: “I am writing on behalf of Clarendon Foundation, licensee of 20 EBS Licenses throughout the United States.”

In contrast, by a long-term *de facto* transfer application submitted by Heritage Christian Academy (transferor) and Fixed Wireless Holdings, LLC (transferee),<sup>9</sup> the applicants made the following representation: “The term of the lease for EBS Station WLX998 will commence upon the date on which the FCC’s grant of the lease application becomes a Final Order (“Lease Commencement Date”). The lease will not extend beyond: (i) the date such authorization expires by its terms; (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term of [sic?] the termination of the Agreement pursuant to the early termination provisions of the Agreement (“Lease Termination Date”). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable

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<sup>9</sup> This transfer application was assigned FCC File Number 0002129453.

for a term to expire on December 6, 2013, in accordance with the applicable FCC rules.”<sup>10</sup> [Emphasis added.] This application was executed by a representative of the Academy on April 15, 2005 and by Fixed Wireless Holdings on April 18, 2005.

A reasonable reading of the transfer application is that this lease would last slightly more than eight years. There is no suggestion that the actual lease term would exceed 15 years, as indicated by Heritage’s December 23, 2005 letter to the Commission.

The documents referred to above are attached to this Amendment.

IMWED’s Pending Petition for Extraordinary Relief

In July, 2005, IMWED submitted a Petition for Extraordinary Relief to the Commission in Docket 03-66, requesting: (a) that the Commission require that EBS licensees file unredacted copies of all leases executed during the six-month period beginning January 11, 2005 and ending July 11, 2005; and (b) that these leases be made available for public inspection.

In that Petition, IMWED wrote:

As the Commission reconsiders aspects of the EBS/BRS Report and Order, it needs to have before it the full array of pertinent facts. Numerous applications for EBS *de facto* transfer leases have been filed with the Commission since January 10th of this year. Because such applications are filed via Form 603, there is no means of verifying lease compliance with FCC substantive use requirements, or assessing how their provisions bear upon issues pending before the Commission on reconsideration.<sup>11</sup>

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<sup>10</sup> Exhibit 2, entitled “Response to Schedule B, Questions 3(a) and 3(b).” These questions ask the applicants to provide the date the Lease is due to commence and due to expire.

<sup>11</sup> IMWED Petition, p. 5.



IMWED based its Petition largely on the January, 2005 filing of a lease agreement between Clarendon Foundation and Sprint Corporation which could extend far beyond the FCC-established limit of 15 years---and, indeed, be perpetual---should Sprint desire and the Commission permit.<sup>12</sup>

The IMWED Petition for Extraordinary Relief remains pending before the Commission.

### Relief Sought

The significant contradictions described above reinforce IMWED's contention that *de facto* transfer applications filed on FCC Form 603-T cannot be relied upon as a means of verifying compliance with the Commissions EBS substantive use requirements.

IMWED thus requests that the Commission require the filing of unredacted copies of the leases pertaining to the three long-term *de facto* transfer applications described above, and make those leases available for public inspection. This step will help to resolve the contradictory representations now before the FCC and clarify the record in WT Docket 03-66 in a critical respect.

This step, however, will not answer the question of whether EBS long-term *de facto* transfer applications have, in general, been accurate. IMWED thus reiterates its prior request that the FCC order that all leases covered by transfer applications filed between January 11 and July 11, 2005 be

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<sup>12</sup> *Id.*, pp 2-4.

submitted to the Commission and made public. In the alternative, IMWED requests that the Commission select a random sample of EBS long-term *de facto* transfer applications, and order that the underlying leases be filed, with the contents available for public inspection.

Respectfully submitted,

THE ITFS/2.5 GHz MOBILE WIRELESS  
ENGINEERING & DEVELOPMENT  
ALLIANCE, INC.

By: /s/  
John B. Schwartz, Director

The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc.  
P.O. Box 6060  
Boulder, CO 80306  
(303) 442-2707

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